

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by:
Thomas P. O'Sullivan

Docket No. 75-1420

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P/S

**IN THE
United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

— against —

GLEN SNOW and SAMUEL J. SNOW,

Appellants.

Appeal from the United States District Court for the
Northern District of New York

BRIEF FOR APPELLEE

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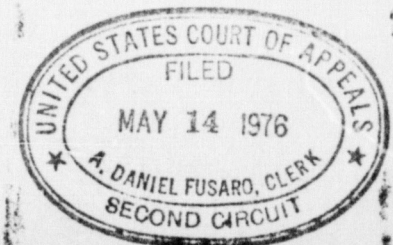


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UNITED STATES OF AMERICA,

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- against -

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Appeal from the United States District Court for the
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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Was the denial of the motion for Judgment of Acquittal at the Close of the Government's Evidence and at the Close of all the Evidence error?

2. Were Appellants Glen Snow and Samuel Snow prejudiced by the fact that matters not alleged in the bill of particulars were proved at trial?

3. Were appellants Glen Snow and Samuel Snow denied a fair trial, by virtue of the trial court's comments on the performance of the attorneys, or by the Court's participation and comments in questioning the witnesses.

STATEMENT OF THE CASE

Course of Proceedings

On July 2, 1975, the appellants, Glen Snow and Samuel Snow, were indicted by a Federal Grand Jury, sitting at Auburn, New York, in the Northern District of New York, charging a one count violation of Title 21, United States Code, Section 846, for conspiring to commit an offense against the laws of the United States, to wit, to violate Title 21, United States Code, Section 841 (a)(1), to unlawfully distribute a controlled substance as set forth in Schedule II of Subchapter I of Title 21, United States Code, Chapter 13, to wit, approximately one-half (1/2) ounce to one (1) ounce of cocaine.

On July 16, 1975, both appellants appeared for arraignment, with counsel, plead not guilty and were released on their own recognizance. Counsel for both appellants were given twenty days to file motions made returnable on September 3, 1975.

On August 7, 1975, counsel for appellant, Glen Snow, filed an omnibus motion for dismissal of the Indictment, a bill of particulars, discovery, suppression of evidence and severance.

On August 25, 1975, the government filed its responding papers, including service of copies on the counsel representing the appellant, Samuel Snow, who had not made motions.

On September 3, 1975, argument on the motions made by appellant, Glen Snow, was heard before the Hon. Judge Foley, sitting in Albany, New York. The motion to dismiss the indictment was denied. The motion for a bill of particulars was granted to the extent agreed to by the government, and otherwise denied. The motion for discovery was granted to the extent agreed to by the government and otherwise denied. The motion for severance was denied. The motion to quash statements to government agents made during the course of the conspiracy was denied except that any admissions or confessions could be contested at time of trial.

The case was called for trial before the Hon. Judge Lloyd MacMahon, sitting in Syracuse, New York, by designation from the Southern District of New York on September 9, 1975, and trial commenced on October 6, 1975.

After a three day trial the jury returned a verdict of guilty as to both appellants on October 9, 1975, sentencing was moved, a pre-sentence investigation was ordered and the appellants were released on their recognizance.

On November 21, 1975, both appellants were sentenced before the Hon. Judge MacMahon to three years probation.

On December 1, 1975, notice of appeal was filed, and after some delay, appellants have taken this appeal to contest the sufficiency of that conviction with respect to the inadmissibility of certain evidence not revealed in the bill of

particulars; the conduct of the Court in participating in the interrogation of witnesses and commenting upon the performance of the attorneys; the propriety of the Court's instructions on the issue of conspiracy; and the propriety of the Court's denial of defense motions for judgment of acquittal at the close of the government's evidence and at the close of all the evidence.

STATEMENT OF FACTS

On April 4, 1975, Agent Mangor, an undercover narcotics agent with the Drug Enforcement Administration, met, for the first time, with a New York State Police informant, at the State Police Barracks in Westport, New York, who agreed to arrange an introduction of the agent to Glen and Samuel Snow later that night. (Appendix and Transcript p. 107 and 119-120.)

The informant proceeded to Ausable Forks, New York, where he encountered Glen Snow on the street next to his trailer home in Ausable Forks, New York. A conversation ensued wherein the informant related to Glen Snow that his cousin Paul, the pseudonym used by the undercover agent, was in town and was interested in purchasing some cocaine, and would Glen Snow be interested in discussing the matter with his cousin Paul. Glen Snow related that he would talk to Paul, the agent, about the matter. (Appendix and TR. p. 108-109 and 223.)

Later, the informant encountered Samuel Snow in Meconi's, a local bar in Ausable Forks, where Glen and Samuel Snow and the informant frequently socialized, at which time, the informant again related, this time to Samuel Snow, that

his cousin Paul, the agent, was in town and was interested in buying cocaine, asking if Samuel Snow would talk to him, Paul, about the matter, to which Samuel Snow responded he would, but could not promise anything. (Appendix and TR. p. 109, 310.)

Later that same night, April 4, 1975, the informant introduced Agent Mangor to Glen Snow at Meconi's Restaurant in Ausable Forks, New York. A conversation between the agent and Glen Snow ensued, during which Glen Snow revealed that he was going to New York City that next week to purchase an ounce of cocaine and that upon his return he would sell the agent one-half ounce of cocaine for a sum of money between six and seven hundred dollars, indicating that the remaining one-half ounce of cocaine had been obligated to others.

The agent offered to buy the half ounce of cocaine and showed Glen Snow that he had the funds to make the purchase by producing a roll of money. Glen Snow during the same conversation also volunteered to show the agent how to cut the cocaine, when he returned from New York City, since it allegedly was pure or of high quality. The agent refused to give Glen Snow his phone number, and accordingly Glen Snow gave his phone number to the agent, writing it down on a slip of paper, directing the agent to call him that next week to finalize the

transaction. (Appendix and TR. p. 27-33, 82-85, 109-110, 123-126, 225-227, and 281-282.)

Lather that night, April 4, 1975, at the same place, Meconi's, approximately one half hour after Glen Snow left Meconi's (Appendix and TR. p. 85-86, 129-130, 227) during which time Glen Snow had occasion to meet with Samuel Snow at the trailer home, where they both resided (Appendix and TR. p. 35, 221, 277, 311-312), the informant introduced Agent Mangor to Samuel Snow.

Thereafter a conversation ensued between Agent Mangor and Samuel Snow, during which Samuel Snow revealed that he would be going to New York City that next week with Glen Snow to purchase cocaine, indicating that the cocaine was high quality cocaine off a kilo shipment, and offered further an explanation as to how they acquired the cocaine in New York City.

He also revealed further that Glen Snow would be taking out a loan in the next week to acquire the money to make the purchase of cocaine. The conversation concluded with Samuel Snow directing Agent Mangor to call them at their residence later that week, indicating that he shared a mobile home with Glen Snow in Ausable Forks, and the agent indicated

that he would get in touch with them by phone. (Appendix and TR. p. 34-35, 86-87, 110, 130-135, and 312-314.)

Subsequently, as related to Agent Mangor, by Samuel Snow on April 4, 1975, that he would, the appellant Glen Snow, on April 9, 1975, secured a loan from a local bank in Ausable Forks, in the amount of six hundred dollars (\$600.). (Appendix and TR. p. 97-100, 236-238, and 297-298.)

On the same day, April 9, 1975, Glen Snow contacted Julian Votraw, the informant, inquiring as to whether he would put up two hundred dollars (\$200.) towards the purchase of the ounce of cocaine. Votraw indicated that he could not and suggested that he would talk to his cousin Paul, the agent, to see if he would put up the money. (Appendix and TR. p. 110, 137-140, 229-230, 261-262, and 285-287.) The informant, thereafter contacted the Drug Enforcement Administration and related this information. (Appendix and TR. p. 140.)

That night on April 9, 1975, Agent Mangor endeavored to contact Glen Snow, by phone, calling first the number Glen Snow had given him on April 4, 1975, listed to the trailer home of Glen and Samuel Snow in the name of James H. Snow, Glen Snow's father. (Appendix and TR. p. 35, 222.)

Unable to contact either Glen or Samuel Snow at their residence, Agent Mangor then called Meconi's, where the meeting

on April 4, 1975, had taken place, where a person identified only as Dave, related, in response to Mangor's request to tell either Glen or Sammy Snow that Paul was calling, that neither Glen nor Sam were there, but that Glen had left a number with him with instructions that if Paul came in or called to have Paul call this number, where Glen was having dinner, which is later identified as the number listed to Glen Snow's father's residence. (Appendix and TR. p. 36, 57-58, 88, and 261-263.)

This particular conversation is one of four recorded conversations that were admitted into evidence both orally by cassette and in transcript form. (Appendix and TR. p. 40-77.) This particular recorded conversation is set out on pages 57-58 of the Appendix and Transcript.

Agent Mangor then called the number given to him when he called Meconi's, and contacted Glen Snow. In the conversation that ensued Glen Snow indicated that he did not have enough money and needed two hundred dollars (\$200.):

MANGOR: Yeah, he told me you wanted some bread fronted?

GLEN: Yeah.

MANGOR: . . .How much?

GLEN: Two.

Agent Mangor related that he was in Burlington, Vermont, but that he would meet Glen Snow in Plattsburgh, New York, that night, indicating that he would call Glen Snow to arrange a meeting place when he reached Plattsburgh, requesting Glen Snow's phone number, to which Glen Snow responded that he had given it to him the other night. (Appendix and TR. p. 36-37, 59-62 (recorded conversation), 88, 231-232, 263-264 and 269-270.)

Later on that night, on April 9, 1975, Agent Mangor called and contacted Glen Snow at his residence in Ausable Forks. In that conversation Agent Mangor arranged to meet Glen Snow in the parking lot of the Howard Johnson's Motel in Plattsburgh, New York, to give Glen Snow the two hundred dollars (\$200.) he had requested.

During that conversation Glen Snow again indicated that he had "run up two hundred short", and that there would be no problem in "covering" what Agent Mangor wanted, although he didn't know if he, Glen, would have enough for an ounce. Mangor indicated that he only wanted a half-ounce for now, and Glen responded, ". . .that's no problem, and that is 650", to which Mangor replied, "650. So the two, I will owe you 450 then?", to which Glen Snow replied, "Right. That is cool."

Mangor then inquired as to when he, Glen, would have the "stuff", and Glen Snow responded that he would have Julian

Votraw, the informant, contact Mangor on the following Friday of that week. Mangor asked if it would be Friday, for sure, and Glen Snow responded it would unless something went wrong, but he indicated that he, Glen Snow, had "talked to everybody and so far everybody thinks everything is cool." Mangor then indicated that he was planning a party for Friday night, and inquired when (on Friday) he, Glen, would bring the "stuff", to which Glen Snow responded that, ". . . (W)e should be home by Friday afternoon". Mangor indicated that he would like to meet with Glen Snow when he returned on Friday afternoon, and Glen Snow indicated he would have Votraw get in touch with him. (Appendix and TR. p. 37-38, 62-65 (recorded conversation), 89, 232, 264-266, 267-276, 288-291.)

Pursuant to the arrangement made in the third recorded conversation Agent Mangor did meet Glen Snow in the parking lot of the Howard Johnson's Motel on the night of April 9, 1975, and at that time Glen Snow got into the vehicle occupied by Agent Mangor and another conversation transpired.

In this conversation Glen Snow again indicates that he is going to New York City to purchase cocaine and that he will sell Agent Mangor a half-ounce of cocaine for six hundred and fifty dollars (\$650.). Glen Snow again explained that he was two hundred dollars (\$200.) short, and indicated that the

reason for this shortage was because Samuel Snow couldn't come up with any money. There was further conversation that the two hundred dollars (\$200.) advance would leave a balance of four hundred and fifty dollars (\$450.) when he, Glen Snow, returned.

Agent Mangor then gave the two hundred dollars (\$200.) to Glen Snow, and he accepted the money. Glen Snow, stated further, that after the consummation of the first deal, that he, Mangor, would only have to deal through him, Glen Snow. He further instructed Mangor to call him on Friday. Mangor inquired if he would have the "stuff" on Friday afternoon and Glen Snow replied that he would. (Appendix and TR. p. 38-39, 90-91, 232-234, 295-297.)

On the following day, April 10, 1975, late that afternoon, Glen Snow and Sam Snow met with Julian Votraw, the informant, at his motel in Brewster, New York. This meeting was pursuant to a prearranged plan, which had been agreed to some two-to-three weeks prior to the time Votraw had introduced Mangor to the two Snows on April 4, 1975.

At the time when the plan was conceived, Votraw had met with Glen and Sam Snow at Meconi's Restaurant in Ausable Forks, New York. While there, Glen Snow told Votraw that they (Glen and Sam Snow) had a connection for cocaine and that

they would be going to New York City to acquire cocaine, and asked him, Votraw, if he would be interested in getting into this with him, Glen Snow.

Votraw agreed to join in with the purchasing of cocaine indicating that he knew people where he worked, for the telephone company in Brewster, New York, who would buy cocaine from him.

Samuel Snow, who was present during the conversation between Votraw and Glen Snow, told Votraw at that same time in the presence of Glen Snow, that they (Glen and Samuel Snow) were going to New York City for a get-together to meet some people to acquire the cocaine, and asked if Votraw would go in with him financially, to which Votraw agreed.

At that time Votraw gave Glen Snow his telephone number and address at the Fox Ridge Motel in Brewster, New York, where they could contact him when they decided to go to New York City.

After the time of this initial agreement, but prior to April 4, 1975, Votraw made contact with a fellow employee in Brewster who was interested in purchasing a quarter ($\frac{1}{4}$) ounce of cocaine, and Votraw agreed to make the arrangements to acquire it for him.

At some time prior to April 10, 1975, Votraw had told Glen and Sam Snow of the prospective buyer for the cocaine

in Brewster, and on April 10, 1975, when Sam and Glen Snow met with Votraw at his motel in Brewster, Votraw told them that the deal had been confirmed, and that the buyer would have the money for Votraw that next morning. (Appendix and TR. p. 110-112, 129, 139-141, 207-209, 239-240, 308, 314-316.)

Shortly after their arrival and meeting with Votraw in Brewster, Glen and Sam Snow accompanied by Votraw proceeded in the Snow's vehicle to Manhattan in New York City. On the way to Manhattan Glen Snow, expressed to Votraw that he felt insecure about the deal with Votraw's cousin Paul, Agent Mangor, who he thought was strange or peculiar, indicating that he had reservations about dealing with him. Samuel Snow, at the same time also expressed that he thought Paul was peculiar and he too had reservations about dealing with him.

Votraw, agreeing with them, said he didn't blame them, indicating that he also felt Paul was peculiar, and that other than the fact that he was a cousin he probably wouldn't have anything to do with him either. He also told them that if they didn't want to deal with him, Agent Mangor, that he, Votraw, would not have any hard feelings, since they indicated they were only dealing with Mangor as a favor for Votraw. (Appendix and TR. p. 112-113, 142-144.)

With respect to this conversation between Votraw and Glen and Sam Snow on the way to Manhattan, both appellants related that Votraw had told them that Mangor was really not his cousin, but rather, he, Votraw, believed him to be a "nark", which Glen Snow interpreted to mean a cop of some kind. (Appendix and TR. p. 241-242, 292, 316-319, 333.)

After they reached their destination in Manhattan, before entering the apartment, Glen Snow gave Votraw the two hundred dollars (\$200.) he had received from Agent Mangor, telling him, "This is your cousin's money", and indicating he was relieved that he wasn't going through with the transaction because of his reservations. (Appendix and TR. p. 113, 145, 241, 319.)

Shortly after their arrival at the apartment of an associate of the source of the cocaine, the source left to acquire the cocaine, but returned empty-handed on his first attempt. When he returned Samuel Snow asked him, "Anything?", to which the source responded by gesture, demonstrated to be an extension of his hands in a supplicating motion. Thereafter the source left again indicating that he was trying to get hold of his man, but he again returned empty-handed, saying he didn't find his man. The source once again left, and when he returned he had a bag in his hand, and said, "I got it, I got the coke."

The source handed the bag to Glen Snow who examined and tasted it, and passed it to Samuel Snow who did the same, and he in turn passed it to Votraw who did the same, passing it on to the source's associate, who gave it back to Glen Snow.

All five of the participants then crushed the half ounce of the substance that was acquired and cut it with lactose or some cutting agent to make what they considered to be three-quarters of an ounce of the substance, which they bagged in roughly equal proportions in three plastic bags, which Glen Snow put into his coat pocket. (Appendix and TR. p. 114-115, 150-163, 243-248, 319-322.)

Early the next morning at about 2:00 a.m. on April 11, 1975, Glen Snow, Sam Snow and Votraw returned to Brewster, New York, where they retired for the night at Votraw's motel room. At about 7:30 a.m. of that morning, the fellow employee of Votraw, whom Votraw had solicited as a buyer for one-quarter ounce of the cocaine, arrived at Votraw's motel room, while Samuel and Glen Snow were still present, as Votraw had pre-arranged with him, to make the exchange of cocaine and money.

Votraw indicated to the buyer that he had it and asked if he had the money, to which the buyer responded he did. Votraw then obtained one of the three packets of the

substance from Glen Snow's coat pocket and gave it to him. After sampling the substance the buyer gave Votraw three hundred and fifty dollars (\$350.) in exchange.

During the course of this transaction Glen Snow awakened and Votraw introduced him to the buyer. Thereafter Votraw gave all of the money he had received from the sale to Glen Snow, who put it into his wallet. Shortly after or contemporaneously Glen Snow in the presence of Samuel Snow, gave Votraw approximately three grams of the acquired substance as payment for his efforts in securing the buyer. (Appendix and TR. p. 115-116, 166-169, 249, 323-324.)

Later that afternoon on April 11, 1975, Agent Mangor attempted to contact the Snows, and unable to reach them at home he called Meconi's; a woman answered and he asked to speak to either Glen or Sammy Snow. First, Samuel Snow came to the phone, and learning that it was Paul, Agent Mangor, inquiring as to what had happened, Samuel Snow responded, ". . . Let me let you rap to Glen, then."

Glen Snow came onto the phone and related to Mangor that they had gone down but nothing happened. He further related that the informant, Votraw, had his, Mangor's, money. Glen Snow reiterated that the three of them, Sammy Snow, Votraw, and himself had gone to New York City the day before but something had gone wrong.

During the conversation, Mangor inquired as to whether Glen Snow would be able to do anything in the future and asked when he would go down again, to which Glen Snow responded that he would be going down again, "Probably in a week or two."

Mangor then asked if he would be able to "cop an ounce" the next time, to which Glen Snow responded, "Yeah, but I'll do everything ahead of time." Mangor further inquired as to whether he would be going down that next week or the week after, to which Glen Snow responded that he wasn't sure. Mangor then inquires, "Well, I thought you had the bread. You told me you had \$600.", to which Glen Snow responded, "Well, I did but I lost a hundred". Mangor then indicated that he would call in the next week. (Appendix and TR. p. 39-40, 65-70 (recorded conversation), 91-92, 235, 293-295, 296-299, 301.)

On the morning of April 18, 1975, Agent Mangor telephoned the residence of Samuel and Glen Snow and contacted Samuel Snow, who informed Agent Mangor that they, Samuel Snow and Glen Snow, would be going to New York City to purchase one to two ounces of cocaine, and that he, Mangor, would be able to purchase one-half to an ounce of cocaine when they returned. (Appendix and TR. p. 70-71, 92, 331.)

On the afternoon of April 18, 1975, Mangor encountered Glen Snow at the Plattsburgh Air Force Base, and using the ruse that he was hitchhiking secured a ride into town with Glen Snow. Enroute to Plattsburgh, Glen Snow told Mangor that he was expecting a quantity of cocaine to come up from New York City and that he would sell Mangor one ounce of the cocaine for eleven hundred dollars (\$1,100.). During this same conversation, Glen Snow, related that he does not like to deal in ounce quantities because when he sells in smaller quantities he makes more money. (Appendix and TR. p. 71-76.)

On April 23, 1975, Mangor again called the residence of Glen and Sam Snow and contacted Samuel Snow, who related that he was going to New York City to pick up a quantity of cocaine that weekend, and that he, Mangor, should call back in a couple of days to discuss a deal with Glen Snow. (Appendix and TR. p. 76-80, 331-332.)

On April 25, 1975, Mangor again called the Snow trailer home and contacted Glen Snow, who related to Mangor that his people were enroute from New York City with a quantity of cocaine, but all of it was obligated to other people. He further related that Samuel Snow must have gotten the information messed up, but told Mangor to call him in a couple of weeks. (Appendix and TR. p. 81.)

On May 6, 1975, Agent Mangor had a phone conversation with Samuel Snow, who related that he and Glen Snow had gone to New York City on a previous occasion and had acquired a half-ounce of cocaine. (Appendix and TR. p. 332.)

In further conversation Samuel Snow indicated that he would, himself, go to New York City and purchase cocaine for Mangor if he would advance the money. They arranged a meeting on May 12, 1975, at which time Mangor advanced six hundred and fifty dollars (\$650.) to Samuel Snow for the purchase of cocaine. However, Samuel Snow never met with the agent to deliver the drugs. (Appendix and TR. p. 325-327, 332-333.)

Thereafter, Agent Mangor with Agent Dunham encountered Samuel Snow in Meconi's Bar, where Agent Dunham assumed the pretense that he had put up some of the money which Paul, Agent Mangor, had fronted to Samuel Snow, and wanted to know what he was going to get out of this deal. When confronted in that manner by the two agents, Samuel Snow related that he had been ripped off in New York City, but that he would try to get their money back for them. (Appendix and TR. p. 327-328.)

With respect to this matter Samuel Snow on direct examination related that after his arrest he had told an officer

of the law that he had gone to Harlem with money and gave it to someone who never returned, but further related that what he told this officer was not the truth, and that he later told the same officer that he had ripped off the agent's money. (Appendix and TR. 326-327, 333.)

The day after Agents Mangor and Dunham had encountered Samuel Snow at Meconi's agents of the Drug Enforcement Administration executed a search warrant at the trailer home of Glen and Sam Snow. During this incident the testimony reflects that the agents had drawn their weapons, and that when they entered the mobile home, they encountered the appellant Glen Snow in possession of a gun; however, there was no violence, and no further force was necessary.

The testimony would also reflect that as a result of the search some matter was seized on the belief that it was a controlled substance, and the appellants were later charged with possession of methamphetamine. However, after processing at the office of the Drug Enforcement Administration in Rouses Point, New York, the appellants were released, and thereafter the charges were dismissed when the seized matter tested to be incense and not methamphetamine. (Appendix and TR. p. 328-329, 334-338.)

ARGUMENT

POINT I. THE DENIAL OF THE MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENTS' EVIDENCE AND AT THE CLOSE OF THE EVIDENCE WAS NOT ERROR.

The standard to be applied on a motion for acquittal for insufficiency of the evidence is whether a reasonable mind of the juror could draw such an inference from the evidence so that he might fairly conclude guilt beyond a reasonable doubt. United States v. Brewer, 482 F.2d 117 (2d Cir. 1973); United States v. Taylor, 464 F. 2d 240 (2d Cir. 1972).

This standard applies to the inquiry of the trial court whether it be at the close of the government's evidence or at the close of all the evidence.

On appeal the sufficiency of that evidence must be determined in light of the totality of the evidence and the inference to be drawn from the evidence, considered in the light most favorable to the government. United States v. Tramunti, 500 F. 2d 1334 (2d Cir. 1974).

Conviction by a jury must be sustained in a criminal case if there is any relevant evidence which the jury could properly find or infer beyond a reasonable doubt, that the accused is guilty. United States v. Glasser, 443 F.2d 994 (2d Cir. 1971).

It is suspected that the appellants' contention with respect to this issue results from a misconception of the proof required in a conspiracy case. It may therefore be appropriate to outline what needs to be proved.

The gravamen of the offense is the agreement to carry out the act which would be a crime and it is a wholly distinct crime from the act itself. United States v. Borelli, 336 F. 2d 376 (2d Cir. 1964). The determination that the agreement exists as to each of the accused is a question of evidence for the court, who has wide discretion and need only be satisfied that there is independent evidence to link the accused to the conspiracy which is credible to support a finding of joint understanding and such evidence may be wholly circumstantial, or may be an innocent act which when viewed in context justifies the inference of complicity or even mere presence at the scene of an offense when the accused is likely to be aware that the offense will occur and his presence either facilitates or permits the offense. United States v. Ragland, 375 F. 2d 471 (2d Cir. 1967).

The fact that there must be independent evidence of participation in the common scheme by each defendant does not require that the jury must find such evidence before considering the hearsay statements of each defendant as to the other defendants, and indeed the court need not give a charge to that effect as was done by the court in the instant case, (Tr. and Appendix p. 407). United States v. Stadter, 336 F. 2d 326 (2d Cir. 1964).

The accused need not participate in each act of the conspiracy to be a part of it, a simple act may suffice, if it is one from which knowledge of the conspiracy may be inferred. United States v. Santana, 503 F. 2d 710 (2d Cir. 1974).

Once found to be a member of the conspiracy the accused is bound by or responsible for acts and statements of all the members of the conspiracy, even those who may be unknown to him, which are made in furtherance of the conspiracy. The precise definition of each member's role need not be proved, regardless of whatever his level of participation may have been it may be inferred that he intentionally contributed to the success of the overall conspiracy, from the fact that he has agreed to join into the conspiracy. United States v. Cirillo, 468 F. 2d 1233 (2d Cir. 1972); United States v. Stromberg, 268 F. 2d 256 (2d Cir. 1959).

The critical inquiry is the nature of the agreement since it is the agreement that is the crime. United States v. Cirillo, supra. The reason for proof of an overt act in furtherance of the conspiracy is to manifest that the conspiracy is at work and is neither simply a contemplated project nor a fully completed operation that no longer exists. United States v. Armons, 363 F. 2d 385 (2d Cir. 1966).

The common purpose of the conspiracy makes the acts of one conspirator the acts of all, each conspirator is the agent of every other member of the conspiracy and is liable for the

acts of every other conspirator done in furtherance of the conspiracy. Similarly the declarations of a conspirator made during the existence of the conspiracy and in furtherance of the conspiracy are admissible against all who are members of the conspiracy. Conspirators have identity of interest so that admissions of one have probative value against the others, and therefore are admissible against the others. United States v. Sansone, 231 F. 2d 887 (2d Cir. 1956).

The crime of conspiracy is proved where there is proof of the unlawful agreement between two or more persons, and proof that one of those persons has taken an overt act in furtherance of the unlawful object of the conspiracy, which may, itself, be an innocent act. United States v. Armone, supra.

Moreover a conspiracy once established is presumed to continue until the contrary is shown. United States v. Stromberg, supra. Once membership in the conspiracy is shown affirmative proof of withdrawal must be shown. United States v. Cirillo, supra. Evidence that reflects that the relationship is continuing intimate and pursuant to a common scheme establishes a single conspiracy, although it may have many members involving various transactions. United States v. Bynum, 485 F. 2d 490 (2d Cir. 1973).

In the instant case as outlined in detail in appellee's Statement of Facts, the meeting between appellant Glen Snow and Agent Mangor on April 4, 1975, wherein Glen Snow agreed to sell the agent a half-ounce of cocaine, clearly establishes, if Mangor is believed, that Glen Snow know is a seller of cocaine, and conspirator in that venture, with persons unknown, since he obviously had a source.

Shortly after on the same night at the same place the agent meets with appellant Samuel Snow, who related that he would be going with Glen Snow to purchase the cocaine which the agent had agreed to buy. In the course of that conversation Samuel Snow clearly reveals that he has full knowledge of the operation of Glen Snow and that he is an active participant in that venture.

The conversation of the agent with both appellants further indicate that there may be others involved in New York City and still others in the local area, since it is revealed that some of the cocaine they expected to buy had already been obligated to others, and this same fact indicates that this venture had been in existence for some time prior to these meetings with the agent.

When viewed together these two meetings and their respective conversations clearly show that by inference there had been a prior agreement between Glen Snow and Samuel Snow to confederate together for the purpose of distributing cocaine. Moreover, since both meetings were in the nature of solicitation for the sale of the cocaine they were to acquire, they both were also overt acts

in furtherance of the conspiracy.

Accordingly, the meetings showed the existence of the conspiracy, and the extra-judicial statements of each appellant, considered separately as evidence only applicable to the declarant, himself, reflected independent evidence of the complicity of each in the conspiracy, from which the Court and the jury alike could infer that each was independently connected to the unlawful agreement to distribute cocaine, and that they had conspired and were conspiring with each other in that venture.

Once the conspiracy was shown and the independent connection of each to the conspiracy then the acts and statements of each in furtherance of the conspiracy could be used against the other, and accordingly since the meetings were, themselves, overt acts in furtherance of the conspiracy, complete proof of the conspiracy was fully established, solely on the testimony of Agent Mangor.

Agent Mangor's testimony, however, is fully supported by additional proof. On April 4, 1975 at the meeting with Samuel Snow, he related to Agent Mangor that Glen Snow would be taking out a loan within the next week to acquire funds for the purchase of the cocaine, and just as Samuel Snow had related, Glen Snow did in fact on April 9, 1975, within the next week secure a loan in the amount of \$600, which was verified by the testimony of the representative from the bank. Hence, the proof of the third overt act. Agent Mangor's meetings with both Glen and Samuel Snow on

April 4, 1975, are confirmed by the witness Votraw, who also testifies to much of the conversation between Mangor and Glen Snow, which he overheard, which supported the testimony of Mangor.

Votraw does not hear the conversation between the agent and Samuel Snow, and Samuel Snow suggests why Votraw disassociated, himself, from that conversation. According to Samuel Snow, Votraw was to bring him a quantity of marijuana, which Snow wanted to ask him about, and if true, Votraw obviously did not want to talk to him about that in the presence of the agent. (Tr. and Appendix pp. 312-313).

Additionally, Votraw and Mangor substantiate each other with respect to the \$200 advance that Glen Snow seeks to obtain first from Votraw and then from Mangor, who through a series of phone calls arranges to meet Glen Snow in the parking lot of the Howard Johnson's in Plattsburgh, New York, where in fact Mangor does give the \$200 to Glen Snow as front money for the purchase of the cocaine.

Those phone conversations recorded by the agent and introduced into evidence, clearly showed that Glen Snow was seeking the \$200 as "front" money, and that it related to a prior agreement to sell Mangor something less than an ounce of something described as "stuff" for \$650, which supports Mangor's testimony regarding the deal made on April 4, 1975, to purchase from Glen Snow, for \$650 the half ounce of cocaine.

Those recorded conversations also show that Glen Snow had indeed given Mangor his phone number on April 4, 1975, and that he had left another number for Mangor to call indicating his desire to get in touch with Mangor. Moreover, they revealed that he, Glen Snow, and not Votraw had arranged the deal to acquire the "stuff," and that Mangor would get the "stuff" on the following Friday afternoon.

Mangor's testimony also reflected that Glen Snow had related that the reason he needed the \$200 advance was because Samuel Snow could not come up with his share of the money, thereby further linking Samuel Snow in the relationship with Glen Snow.

Glen Snow's acceptance of the \$200 from the agent which is fully credited by Glen Snow's own words on the recorded conversations, thereby completed the fourth overt act.

Accordingly, Mangor's testimony supported to this extent by Votraw, the bank representative and the recorded conversations fully proved all of the allegations of the Indictment.

Judging that evidence in this light most favorable to the government it is clear that the reasonable mind of the juror could well conclude guilt beyond a reasonable doubt with respect to each appellant.

The further testimony of Mangor, relates to what happens after his money is returned. On April 11, 1975, in another recorded phone conversation he talks to both Samuel and Glen Snow. His conversation with Samuel Snow is brief but telling. As soon

as Samuel Snow finds out who is talking to, and the purpose is stated as no more than "what's happening," Samuel Snow, without any request to do so by Mangor, immediately indicates that he should talk to Glen Snow. Thereby, reflecting that he knows the purpose of Mangor's call, and that he is working in concert with Glen Snow in this deal with Mangor.

Mangor's subsequent conversation with Glen Snow reveals that he is still in business and still contemplating negotiation of a deal with Mangor. Thereafter on April 18, 1975, Mangor has a phone conversation with Samuel Snow who relates that he and Glen Snow expect to purchase up to two ounces of cocaine in the near future and he would be able to acquire a half-ounce when they returned. On the same day he contacts Glen Snow, who related that he was expecting to acquire a quantity of cocaine and would sell an ounce for \$1,100, when it came.

On April 23, 1975, Mangor, again has contact with Samuel Snow who relates that he would be going to New York to pick up a quantity of cocaine that weekend and he should contact Glen Snow to arrange a deal. However, when Mangor contacts Glen Snow on April 25, 1975, Glen Snow tells him that Samuel Snow must have messed up since although they were getting some cocaine it had all been obligated to others. However, he indicates that Mangor should call in a couple of weeks to make a deal.

The gist of these further conversations, although not overt acts in furtherance of the conspiracy, since they never commit themselves to a deal, indicate, however, that the conspiracy is still in existence at that point in time, and significantly operating after April 11, 1975, which is verified by the recorded conversation on that date.

The further testimony of Votraw reveals that as alleged in the bill of particulars, Votraw, and Glen and Sam Snow did travel to New York City to acquire the cocaine. Moreover, his testimony revealed that they did in fact acquire a quantity of cocaine, and on the next day they did in fact distribute a quantity of cocaine.

Votraw testified further that prior to April 4, 1975, he and Glen and Sam Snow had met in Ausable Forks, New York, and at that time he was induced into the agreement with Glen and Sam Snow to assist them in the purchase and sale of cocaine, and that the trip to New York City on April 10, and the subsequent sale on April 11, 1975, were pursuant to that agreement.

Accordingly the government submits that there was ample proof on the government's case-in-chief from which the reasonable mind of a juror could conclude from the evidence that both appellants' were guilty beyond a reasonable doubt. United States v. Brewer, 482 F. 2d 117 (2d Cir. 1973).

The sufficiency of the evidence at the conclusion of the case is even more compelling. The defense does not deny the meetings on April 4, 1975, took place; they do not deny that the loan was secured; nor do they deny the recorded phone conversations; nor the meeting with Mangor on April 9, 1975; nor the fact that Glen Snow accepted the \$200 and made the agreement to acquire the cocaine for Mangor; nor the trip to New York City; nor the fact that cocaine might have been acquired at that time and place; nor the fact that it might have been sold the next day in the presence of both appellants; nor do they deny the very first meeting with Votraw prior to April 4, 1975, nor the earlier meetings with on that day prior to being introduced to Mangor.

Virtually nothing in the prosecution's case is refuted, and indeed there is no way to avoid the impact of the recorded conversations which fully support Mangor's testimony. The claim of innocence on the part of Glen Snow is predicated upon the totally implausible notion that he was pretending to be a drug dealer as a favor for Votraw, and he kept up this pretense even after he allegedly knew that Mangor was some kind of undercover narcotics cop. The claim of innocence on the part of Samuel Snow, with respect to the period of the conspiracy alleged in the Indictment, was that he knew nothing, he saw nothing, he heard nothing, and he was drunk most of the time or indeed at

all the critical times. After, April 25, 1975, he creates another implausible defense that even though he knew Mangor was a cop he schemed to rip him off, and actually did so, with the result that the government in seeking vengeance had manufactured this entire case to get even, and had been so vindictive that they sought to get his cousin as well. The facts with respect to the testing of incense to see if it were methamphetamine put to rest the motion that vengeance was the government's motive.

Accordingly, it is submitted that the sufficiency of the evidence at the close of the entire case was more than sufficient for denial of appellant's Rule 29 motion, and is more than sufficient to sustain the conviction on appeal. United States v. Glasser, 443 F. 2d 994 (2d Cir. 1971).

The evidence also reflects that the relationship between Glen Snow and Samuel Snow throughout the entire period between April 4, 1975, and April 25, 1975, and prior to that time ever since the first meeting with Votraw when they brought him into the conspiracy was continuing, intimate and pursuant to a common scheme. It is therefore without question that this was one conspiracy. The subsequent sale on April 11, 1975, was contemplated by the first meeting prior to April 4, 1975, and the whole transaction with Mangor was pursuant to that original plan to go to New York to acquire the cocaine. Appellants' claim of multiple conspiracy is totally without merit. United States v. Bynum, 485 F. 2d 490 (2d Cir. 1973).

Accordingly, the additional point raised that the Court lacked jurisdiction in frivolous. Venue would lie in any district where an overt act had been committed. United States v. Campisi, 248 F. 2d 102, 107 (2d Cir. 1957), cert. den. 355 U.S. 892 (1957):

POINT II. APPELLANTS GLEN SNOW AND SAMUEL SNOW WERE NOT PREJUDICED BY THE FACT THAT MATTERS NOT ALLEGED IN THE BILL OF PARTICULARS WERE PROVED AT TRIAL.

The short answer to the contention raised by appellants with respect to the variance between the proof and the bill of particulars is that no objection to the testimony contested here on appeal was taken below, and therefore it cannot be raised on appeal. United States v. Del Purgatorio, 411 F. 2d 84 (2d Cir. 1969).

An objection based upon alleged variance between the proof and the bill of particulars, was raised with respect to the testimony of Agent Mangor as to conversations after April 11, 1975, which was overruled by the Court accepting the government's position that these were not overt acts, but conversations indicating that the conspiracy was continuing after that date. (Appendix and Tr. pp. 70-80).

On appeal appellants object to the testimony of Votraw with respect to matters occurring after April 10, 1975, and the only matter after that date to which he testified is the sale on April 11, 1975. The record reflects that there was no objection to that testimony. (Appendix and Tr. pp. 114-117).

The record also reflects that both appellants cross-examined the witness as to this matter. (Appendix and Tr. pp. 166-169, 215-216). And, also, that both appellants testified as to the matter on direct testimony and conspicuously not on

cross examination. (Appendix and Tr. pp. 249-250, 324).

The record also reflects that the witness never revealed this information to the government prior to trial. (Appendix and Tr. pp. 169-171; 172-189; 188; 190-191). And that he in fact withheld this information refusing to testify on grounds of self-incrimination. (Appendix and Tr. p. 205-206). Moreover he was apparently shrewd enough to know that informal immunity would not protect him from a crime in another district. (Appendix and Tr. pp. 205-206). Its clear in the record that the government knew nothing about the matter until the eve of trial. (Appendix and Tr. pp. 211-212). Nor was it know that the witness would testify at all at trial. (Appendix and Tr. pp. 95-96; 104).

Accordingly, the testimony was as surprising to the government as it was to the defense, perhaps more so, since Glen Snows' testimony indicated he was aware that cocaine had been acquired on April 10, 1975, and was aware that Votraw was dealing in marijuana.

The cases cited by appellants for the most part deal with the issue of variance where the court has ordered a response, whereas here there was no such order, and indeed the request to furnish particulars as to possession was denied. Indeed description of overt acts not enumerated in the Indictment need not be furnished. United States v. Iannelli, 53 F.R.D. 482, 483 (S.D.N.Y., 1971). Nor does a bill of particulars preclude the government from using proof it may develop as trial approaches. United States v. Crisona,

271 F. Supp. 150 (S.D.N.Y. 1967).

In fact it appears that appellant Samuel Snow would concede that the subject was not a proper matter for a bill of particulars, but bottoms his argument on the fact that the government's attorney assumed the burden to supply the information. It is difficult to see how that could have been done prior to trial in view of the fact that the matters were not known to the government.

In any event it is well settled that a variance between proof and a bill of particulars is not ground for reversal unless the appellant is prejudiced by the variance. United States v. Glaze, 313 F. 2d 757 (2d Cir. 1963).

Where an Indictment alleges a conspiracy to distribute cocaine its difficult to see how it can be claimed that proof of a distribution of cocaine can be surprising.

The fact that the testimony was damaging does not establish prejudice. The prejudice must result from the surprise. United States v. Armocida, 515 F. 2d 49 (3rd Cir. 1975). In the instant case the record refutes the contention of surprise. The Indictment put appellants on notice, and they have not shown on appeal that they would have done anything different. United States v. Armocida, supra.

It is to be noted that the witness who gave the testimony was known to the appellants. He was cross examined as to the matter by both appellants and both appellants testified as to the matter.

Accordingly, there was no void of proof on the issue. United States v. Glaze, supra.

It is not known what further proof could be offered on the issue. Glen Snow's testimony indicates that Votraw did acquire cocaine and that there was someone present in the room at the time related by Votraw, and accordingly the sale by Votraw would still be consistent with his testimony. Calling the alleged purchaser as a witness, assuming that he would testify to his crime, would not materially alter the situation regardless of what his testimony would be.

Moreover, since his name was known at trial, elicited by appellant Glen Snow, he could have been called at that time.

There being no claim of unfair surprise or request for continuance at trial the claim of prejudice on appeal by reason of such variance should be rejected. United States v. Armontrout, 411 F. 2d 60, 65 (2d Cir. 1969).

POINT III: NEITHER APPELLANT GLEN SNOW NOR SAMUEL SNOW WERE DENIED A FAIR TRIAL, BY VIRTUE OF THE TRIAL COURT'S COMMENTS ON THE PERFORMANCE OF THE ATTORNEYS, NOR BY THE COURT'S PARTICIPATION AND COMMENTS IN QUESTIONING THE WITNESSES.

In view of the fact that neither appellant makes a single reference to the record it is difficult to know what comments and questions in the record they protest.

It must be assumed therefore, from the assertion of both appellants' that,

"The record speaks for itself", that they do not claim prejudice by virtue of a few isolated remarks or questions by the Court, but rather claim that the Court's conduct throughout the entire course of the trial was to obstruct the defense and assist the prosecution, and to demean defense counsel in the eyes of the jury.

Accordingly, the appellee has undertaken the task of searching the record to determine the facts. The following is a compilation and summary of the trial court's comments to the attorneys and comments made in questioning the witnesses, under Item Heading A, and a summary of the questioning by the court under Item Heading B.

- 1 A) The Court's Comment's on the Performance of all Counsel
and Participation in the Examination of Witnesses
* (Page Citations)

Mr. O'Sullivan: Prosecutor

Opening Statement: Comment on the Law

p.9 The Court: "Mr. O'Sullivan, please leave the law to me. Tell the jury what you expect to prove.

p.9 The Court: Please leave that to the Court. Don't let me have to tell you again, Mr. O'Sullivan.

p.11 The Court: Mr. O'Sullivan, I don't want to have to tell you again to leave the law to the Court or I will declare a mistrial.

p.11-12 The Court: I hesitate to interrupt this way, ladies and gentlemen, but as I have told you, I am the judge of the law. There is a good reason for that. I am not an advocate here and I will state the law down the middle as it is, and neither side has any right to tell you what the law is. That is the Court's function. That is the first thing any young lawyer ought to learn out of law school, but none of them up here seem to have learned it.

Direct Examination of Agent Fitzpatrick.

p.14 The Court: Keep your voice up.

p.15 The Court: I'm sorry. I haven't the slightest notion what is coming here and I want to hear this before the jury does.

You may take a short recess.
(Jury leaves Courtroom).

p. 15-16 The Court: All right, Mr. O'Sullivan, let me hear this in camera without the jury so that I will know what is coming and what isn't, because, obviously, you don't... So far, everything you have asked has been improper and inadmissible and incompetent. It would be reversed on appeal like that and it ought to be, so let's get it straight.

* The page citations are to the Trial Transcript for pages prior to page 24; pages citations after page 24 refer to both the Trial Transcript and to Appellant's Appendix on appeal.

Court Interrogates Witness:

p.17 The Court: No, I don't care about that. That is not competent evidence and you ought to know it as a narcotics agent, somebody ought to know it.

p. 22 The Court: How do you know it was Snow? It could have been Lloyd MacMahon. How do you know.

p.23 Prosecutor excuses the witness.

Court: let's ...see if we can start with some competent evidence Some of what he wants to tell us is competent proof and alot of it isn't, and it is your job to sort it out.

Direct Examination of Agent Mangor

p.25 Court: (In response to Mr. Fisher's suggestion that the witness is referring to notes) Do you have notes?

Witness: ... yes

Court: Give them to me.

p.29 The Court: Can't you state the conversation as best you can recall?

p.31 The Court to Prosecutor:

Photostat the document ... You should have done it before.

p.40 The Court to Prosecutor:

I'm sorry, I can't hear you. Perhaps if you got the pen out of your mouth, I could.

p.47 Court to Prosecutor regarding recorded conversations.

"... You just make problems for yourselves by not doing anything ahead of time. All right. Are you offering them now?

p.53 Court, out of jury's presence chastises the prosecutor for suggesting a solution to an evidentiary problem.

"Don't tell me what you can do. I will tell you what you can do."

p.77 Out of jury's presence Court criticizes the prosecutor's legal papers.

"What legal work!

Immunity Problem

p.95 Out of presence of the jury the Court chastises the prosecutor for not attending to these problems by a pre-trial conference.

p.96 Out of the jury's presence the Court, scolding, asked the prosecutor if the trial had come as a surprise.

p.104 In the jury's presence the Court remarks to the same effect:

"The Government isn't ready with its next witness. We will have to take a recess. The trial, apparently, comes as a great surprise. It has only been on the calendar for a month."

Direct Testimony of Julian Votraw

p.109 (Jury Present) The Court sustaining defense objection remarks.

"Please hold the witness to competent testimony, Mr. O'Sullivan, that is your job."

P.113-114 The Court in response to defense objection questions the witness to clarify to jury that the witness can not recall a particular conversation.

Cross-Examination of Votraw

p.117 In presence of the jury the Court remarks to the prosecutor:

"There is no place like a Courtroom to prepare a case."

p.193 and 196 Court in presence of the jury criticizes the prosecutor for not making objections.

Redirect of Julian Votraw

p.203 The Court sustaining defense objection instructs prosecutor to ask one question at a time commenting,

"There are about 15 there."

p.205 Court asks if the witness realizes that he could be prosecuted for perjury.

Court inquires as to when the witness was promised immunity.

p.206 In presence of jury when recessing for lunch the Court remarks to the prosecutor.

"... you spend the lunch hour and see if you can think of one question at a time."

p.207-208 Court again instructs the witness to be specific so that

he can determine if what he says is admissible evidence.

Cross-Examination of Glen Snow

p. 257 Court inquired as to how far the witness had gone in school.

p. 259 The Court admonishes the prosecutor for arguing with the witness.

p. 267 The Court inquired as to whether the witness was not curious as to why Mangor would give him the \$200, to which the witness responded that Mangor thought he would get the drugs for him.

p. 269 Court instructs the prosecutor to let the witness answer.

p. 272 Court instructs the prosecutor to ask one question at a time.

p. 274 Court instructs the prosecutor to simplify his questions, and again to ask one question at a time and to let the witness answer.

p. 276 Court again admonishes the prosecutor not to argue with the witness remarking:

"Please sum up later."

p. 279 Court inquires as to the conversation on the ride to New York City.

p. 287 Court again admonishes the prosecutor for not letting the witness answer.

p. 289 The Court inquires as to whether the witness was pretending when he told Mangor he would get the cocaine for him.

Colloquy:

Court: and you were just kidding, is that what you are telling us now?

Witness: Yes, I wasn't kidding. I was going along for Jules' sake.

p. 290 The Court admonishes the prosecutor for asking argumentative questions.

p. 294 Court instructs prosecutor to let the witness answer.

p. 296-297 The prosecutor asked the witness if he denied a conversation testified to by Agent Mangor. The witness responded that he did not remember it. The Court asked if he denied saying it. The witness responded that he didn't deny it but didn't remember saying it. The Court then commented:

"You told us you were going along with this thing, pretending to be a supplier of narcotics?"

The witness responded that there were a lot of things he didn't think about at the time.

p. 298 The Court instructed the witness that his answer was not responsive.

Cross-Examination of Glen Snow by Mr. Hatch

p. 303 Court sustains the government's objection and comments:

"You should have objected five minutes ago. Wake up."

Cross Examination of Samuel Snow

p. 334-335 The Court instructs the prosecutor not to get into an area opened up by the defense on direct since there had been no objection.

Jury Charge

p. 390 The Court instructed the jury as follows:

"(Y)ou and you alone are the exclusive judges of the facts. You and you alone decide what weight, what effect and what value you will give to the evidence. You decide whether or not to believe a witness and, of course, ultimately, you decide whether or not each of these defendants is guilty of the crime of conspiracy charged in this indictment.

Now, you are not to conclude from any rulings that I have made throughout this trial or any questions that I have asked or any remarks that I made, that I have any opinion one way or the other as to the guilt or innocence of either of these defendants. That decision is exclusively up to you.

Mr. Fisher: Counsel For Glen Snow

Direct Examination of Agent Mangor

Jury Present

p. 32 The Court to Mr. Fisher

(apologizing for interruption)

(I)t is your duty to interrupt and I will tell that to the jury.

Mr. Fisher would be the subject of a suit for malpractice if he didn't interrupt. The testimony is incompetent. Strike it out and start again.

Jury Present

p. 34 The Court to Mr. Fisher on his second request to instruct the jury that conversations of one defendant are not binding on the other at that point in the trial.

Court: I told you I would take it subject to connection ...(T)hat ruling stands throughout the trial. I'm not going to instruct the jury at this point... It is a matter of evidence for me.

Jury Present

p. 44-45 Court to Mr. Fisher regarding transcript of recorded conversations

Can't you read it between Saturday and now?

p.48 Court to Mr. Fisher regarding whether recorded conversations were the result of a wiretap. (Jury not present)

"What did you think these transcripts were you read Saturday? What have you been doing since the indictment here? ... There are ... pre-trial procedures ... (to) get rid of this kind of housekeeping problem..."

pp. 52-57: Not before Jury

Prosecutor requests that the jury be allowed to have transcripts of the recorded conversations, made at the request of defense counsel, as listening aids, due to the poor acoustics in the courtroom.

Mr. Fisher objects as not being in evidence. Court advises they are in evidence in a different form and asks if the accuracy of the transcripts is disputed. Mr. Fisher, although not disputing their accuracy still objects they are not in evidence.

Court directs prosecutor to offer them in evidence. The prosecutor indicates he will put on a witness to testify to their accuracy.

The Court chastises the prosecutor

"Offer them in evidence. Do what the Court tells you. Don't tell me what you can do. I will tell you what you can do.

The Court continues to ask if Mr. Fisher objects to the accuracy of the transcripts. Mr. Fisher does not.

Comment by Mr. Fisher: The more I say, the more it becomes nonsense, Your Honor, so I will be quiet.

Court's Comment: Well, don't take that attitude. You are here to defend your client.

The Court concedes to the prosecutor's suggestion to call a witness to establish the accuracy of the transcripts, commenting:

"We will do it the hard way."

p. 76-77 The Court in the presence of the jury thanks Mr. Fisher for bringing to his attention the issue that there may be a variance between the proof and the bill of particulars.

p. 45 Out of the jury's presence thanks Mr. Fisher for bringing to his attention that the exhibits given to the jury as a listening aid had not been collected by the clerk before they left the courtroom.

Cross-Examination of Julian Votraw

pp. 142-144 The Court interrupts witness who was testifying in general rather than specific terms, and directs him to respond properly as to where they were, who was present and who said what to whom. The witness responding to the Court's directions was interrupted by a question from Mr. Fisher who may have thought the witness had finished, but which led the Court to respond:

"Please. He hasn't finished my question."

p. 152 The witness testified that one of the participants to an event had made a gesture and the Court interrupted to have the witness demonstrate or explain the gesture.

p. 154 Court interrupts to clarify that the drug conversations between the witness and the defendants, about which he was testifying, had nothing to do with charges against them.

p. 157 Court interrupted to ask if any comments were made while the substance was being examined.

p. 158 Court interrupted to ask what was done with the substance after it was examined.

p. 171 Court granted Mr. Fisher a recess to study a document.

p. 173-174 Court interrupts Mr. Fisher for eliciting repetitious testimony.

Mr. Fisher indicates that he is not clear about the proper procedure in how to impeach a witness with a prior inconsistent statement. The Court explained.

"There is a simple way to lead up, what is your testimony about this now and did you say something different then, that's all there is to it!"

Mr. Fisher beginning improperly was interrupted by the Court who again explained:

"ask him what he says about such and such a fact now, and if it is different there, confront him with it. That is the only purpose for which you can use that testimony. There is no other."

Mr. Fisher still not clear as to the procedure was again interrupted by the Court. Mr. Fisher again stated that he was trying to show prior inconsistent statements and the Court again explained.

"Ask him what his statement is now about whatever it is you are trying to show."

Mr. Fisher then did it properly to which the Court responded:

"All right, now confront him."

Mr. Fisher thereafter relapsed into doing it improperly but since the government did not object the Court allowed it.

Re-Cross of Julian Votraw

p. 210-211 Mr. Fisher attempts to introduce the entire prior statement of Votraw. The government objects to the entire statement but will accept the inconsistent portions. The Court sustains. Mr. Fisher requests that the inconsistent statements be allowed. The Court advises that as he explained before there is a proper way in which that can be done. Mr. Fisher argues that to do that he would have to go through the entire statement. The Court apologized that he does not make the rules of evidence. Mr. Fisher continued to argue prompting the Court to remark:

"Proceed, Counselor. Don't go to law school here.

Mr. Fisher responded: "I beg your pardon?", and the Court repeated:

"I said I can't run a law school here. Proceed."

Motions at the Close of the Government's Evidence.

p.218-219 (Jury not Present)

Court advises Mr. Fisher that his conception of the law that statements made by a conspirator are not binding on a co-conspirator is simply "dead wrong," and makes the motion to strike the testimony on the grounds that there has been no connection, on his behalf, ruling that they are connected.

Direct of Glen Snow

p.245-246 The Court interrupts to ask if the witness tasted or saw anyone taste the contents of the tinfoil packet he had seen passed to Votraw other than Votraw.

The Court then interrupted to ask if the witness knew what the tinfoil packet contained leading to the following Colloquy.

Court: Did you know what it was?

Witness: At that time, sir?

Court: Yes

Witness: No, I did not

Court: What did you think it was?

Witness: I had no idea, sir. I didn't really see what they were doing.

Court: Bubble gum?

Mr. Fisher: Pardon me?

Court: I asked if he thought it was gum.

Mr. Fisher: Did you answer the Judge?

Witness: No, sir, I didn't think it was gum. I figured it had something to do with narcotics.

p.254-255 The Court asks the witness if he ever agreed to supply Mangor with drugs. At the end of the direct testimony.

Cross Examination of Samuel Snow

p.336 The Court advises Mr. Fisher not to continue the line of questioning the Court had not permitted the prosecutor to pursue. Mr. Fisher made an offer of proof and the Court allowed the question and thereafter instructed the jury with respect to the matter.

Mr. Hatch: Counsel for Samuel Snow

Direct Examination of Agent Mangor

p.70-80

This matter concerns a series of objections by defense counsel to the testimony of Agent Mangor regarding conversations between he and both appellants after April 11, 1975, on April 18, 23, and 25 of 1975, within the time of the conspiracy alleged in the Indictment, offered by the government not as overt acts in furtherance of the conspiracy but as conversations indicating that the conspiracy was continuing after April 11, 1975.

The first objection was simply that it occurred after April 11, 1975, which was overruled.

Mr. Hatch then objected to the form of the question which was apparently overruled.

Mr. Fisher objected that it was not covered by the pleadings, which was overruled.

Mr. Hatch then objected that the remarks were prejudicial which was overruled. He then objected that it was not covered by the indictment which was overruled.

Mr. Hatch then objected without stating any ground, which was overruled.

Mr. Hatch frustrated slammed or dropped his book onto the counsel table. The court excused the jury, and admonished Mr. Hatch, warning that he would hold him in contempt for such behavior.

Mr. Fisher then objects that the matters were not included as overt acts in the bill of particulars. The Court thanked him for bringing that to the Court's attention and then excused the jury to hear argument on the point.

The Court out of the presence of the jury then remarked to Mr. Hatch that it would have saved time if he had made a proper objection that there was a variance with the bill of particulars.

Cross Examination of Julian Votraw

p.193-194 The Court restricts Mr. Hatch from reading from a document not in evidence and chastises the prosecutor for not objecting. The document is offered and not objected to by the government. The Court then advises Mr. Hatch that he can now read from the document since it is now in evidence.

p.195-196 The government objects to Mr. Hatch reading from a document not in evidence for purposes of impeachment without the proper foundation and suggests that he could ask the same questions without prefacing that it was a previous statement to lay the foundation.

The Court sustaining responded:

"Ask him the question. I can't seem to get across. You don't read these things. You confront the witness with what his testimony is now and then if you think there is something inconsistent in that, you read that to him, didn't you tell Mr. So and So this at that time. You don't read the whole thing. I tried to get this across to Mr. Fisher without success so I let him read it because there wasn't any objection as there should have been.

p.201 Court interrupts to elicit from the witness that Samuel Snow was not intoxicated when the cocaine was acquired.

p.202 Court asks witness if he is aware that he is testifying under immunity.

Motions at the Close of the Government's Evidence.

p.219-220 (Jury not Present)

Court denies Mr. Hatch's Rule 29 motion that the only proof against appellant Samuel Snow is the testimony of Agent Mangor and therefore the evidence is insufficient since the government had not proved that Samuel Snow had done anything after that conversation with Agent Mangor on April 4, 1975, to carry out the agreement he made at that time.

In denying the motion the Court remarked that it was frivolous. Mr. Hatch asked for an exception and the Court remarked that it hadn't been necessary to request for an exception for 45 years.

Direct Examination of Samuel Snow

p. 321 Court asks the witness if he saw any tinfoil packets while at the apartment in New York City, with his cousin Glen Snow inquiring whether they were in the same room.

Summations

p. 387 Out of the presence of the jury the Court admonished Mr. Hatch for relating to the jury that he was assigned counsel.

Motions at the Close of the Evidence

p. 419-420 of the Transcript

p. 419-465 of the Appellant's Appendix

The Court denied the motions made by Mr. Hatch and joined by Mr. Fisher on the grounds that the issues had not been raised at a time which the Court could have done something about them and additionally, with respect to the merits of the motions the Court considered them utterly intangible.

B) Summary of Court Questioning Prosecution Case

1) Agent Mangor

Direct: (Pages 24-81); (57 pages)

Questions by the Court appear on the following pages (25, 26, 28, 29, 32).

Cross by Mr. Fisher: (pages 81-93); (12 pages) No questions by the Court.

Cross by Mr. Hatch: (pages 93-94); (1 page) No questions by the Court.

2) Mr. Laurence Direct and Cross (pages 97-104); (7 pages) No questions by the Court.

3) Votraw

Direct: (pages 109-117); (12 pages)

Questions by the Court appear on pages (108, 113, 116).

Cross by Mr. Fisher: (pages 117-193); (76 pages).

Questions by the Court appear on the following pages (134, 142, 146, 152, 154-155, 157, 158-159, 189, 191.)

Cross by Mr. Hatch (pages 193-202), (9 pages)

Questions by the Court appear on pages (197, 201-202)

Redirect (pages 202-208); (6 pages) Questions by the Court appear on pages (205, 207).

Recross: (pages 211-216); (5 pages) No questions by the Court.

Totals: Out of 185 pages of testimony in the prosecutions case the Court interrupted for questioning of the witness 27 times.

On the direct testimony of Mangor the Court interrupted only five times: to ask if he could identify Glen Snow; to ask if he offered to purchase the drugs; and three times to hold the witness to competent testimony, twice pursuant to objections by the defense.

The Court asked no questions at all on the cross examination of Mangor or on either the direct or cross of Mr. Laurence.

The Court interrupted only three times on the direct of Votraw to hold him to competent testimony and to clarify what he said on one occasion and who was present on another.

On the cross-examination of Votraw by Mr. Fisher the Court interrupted only nine times out of 76 pages of testimony, twice because the witness could not be heard; twice to keep him to competent testimony; once to clarify a gesture; once to inquire if a comment had been made while the drugs were examined; once to inquire what they did with the drugs after the examination, and twice to ask if he had previously been asked questions by the government authorities.

On the cross of Mr. Hatch he interrupted only three times; to ask if the crime he committed was a misdemeanor; to inquire whether Samuel Snow was intoxicated when they acquired the drugs, and to ask the witness if he were aware that he was immune from prosecution.

On redirect of Votraw the Court interrupted twice; once to inquire when he had been promised immunity by the government, and once to hold him to competent testimony.

On Recross the Court asked no questions.

Summary

Defense Case

1) Glen Snow

Direct: (pages 220-255); (35 pages) Questions by the Court appear on the following pages (245-247, 254-255)

Cross: (pages 255-300); (45 pages).
Questions by the Court appear on the following pages (257, 265, 267, 268, 279, 280, 289, 296-297)

Cross by Mr. Hatch: (pages 301-304) (3 pages) No questions by the Court.

Redirect: pages (304-306); (2 pages) No questions by the Court.

2) Samuel Snow

Direct: (pages 306-330); (24 pages) Questions by the Court pages (321-322)

Cross-(pages 330-335); (5 pages) No questions by the Court.

Cross by Mr. Fisher: (pages 335-338); (3 pages)
No questions by the Court.

Totals: Out of 117 pages of testimony in the defense case the court interrupted for questioning of the witnesses 11 times.

On the direct testimony of Glen Snow the Court made five inquires; did he see any one other than Votraw examine or taste the contents of the tinfoil packet; how many times did the alleged source leave to attempt to acquire the drugs; and did he know what was in the tinfoil packet, that he testified he saw passed to Votraw; did he know of anyone else in New York City who could supply cocaine; and did he tell Agent Mangor that he could get cocaine.

On the cross-Examination of Glen Snow the Court made seven inquires; how much education did he have; did he know what it was he was telling Mangor he would get a half ounce of; wasn't he curious as to why Mangor was giving him \$200; the court inquired as to the conversation he had with Sam Snow on the trip to New York City; the Court twice asked if he denied statements he allegedly made to Mangor; and the Court twice asked if his testimony was that he was pretending to Mangor that he was going to acquire the cocaine.

Summary

The Court asked no questions on the cross by Mr. Hatch or on the redirect of Glen Snow.

On the direct of Samuel Snow he made only two inquiries; did he see the tinfoil packet alleged to have been passed to Votraw and was he in the same room as Glen Snow.

The Court asked no questions on the cross examination of Samuel Snow and there was no re-direct.

With respect to the law there is no doubt that the judge in a criminal case has an active role to play, and that he has the power and the duty to elicit the truth by examination of the witnesses. Glasser v. United States, 315 U.S. 60, 82; 62 S.Ct. 457, 470, (1942).

A judge in a criminal trial is more than a mere moderator between two interested parties, (he represents a third party; the people, as opposed to the State, and the interest that they have in every criminal case, that justice will be done). Accordingly, he should take part, if indeed he is not obligated by his duty to do so, to clarify testimony, and assist the jury in understanding the evidence as an aid to their task of weighing that evidence to resolve the crucial issues of fact. United States v. DeSisto, 289 F.2d 833 (2d Cir. 1961).

However, in exercising his legitimate function the judge must be aware to avoid three crucial dangers, which could, even inadvertantly, tip the scales in favor of one party. He must not usurp the function of the representatives of the parties to either assist or hamper their effort to meet their respective burdens in the case. Nor, may he usurp the jury's function to resolve the issues of fact. Nor, may he, because of the esteem jurors have for

his position, give the impression that he is a partisan of either side in the controversy. United States v. DeSisto, supra.

The crucial judgment is whether the conduct of the Court would indicate to the jury that he was a partisan or advocate for the position advanced by one of the parties. United States v. Persico, 305 F.2d 534 (2d Cir. 1962).

With respect to this inquiry it has been noted by this Court before, that few claims are more difficult to resolve than the claim that the trial judge has thrown his weight in favor of one side to the extent that it cannot be said that the trial had been fair. Where the claim has substance the entire record must be examined to determine if the conduct of the trial was such that the jurors would have been so impressed with the trial judge's partiality to the prosecution case that it became a factor in the outcome of the case rendered by the jury's verdict. United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967).

The inquiry as to whether this impression was created requires scrutiny of the entire record, and of course, what is said outside of the jury's presence cannot contribute to that impression. United States v. Scalafani, 487 F.2d 245, 256 (2d Cir. 1973).

Moreover, as noted by Judge Moore, dissenting in, United States v. Guglielmini, supra, 607-609, one of the more effective tactics of successful defense advocates for generations has been the "endeavor to strive for, and even create reversible error." Accordingly, he cautions that defense counsel's success on appeal in Guglielmini may provide yet another weapon in defense counsel's arsenal to overturn convictions where there is ample proof of guilt.

This Court has noted that the tendency to blame the trial judge for the jury's verdict is a human frailty often encountered. United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973). Accordingly, this Court has held that even where there are instances of improper behavior the determination of whether these instances when considered individually or in context with the entire record, would allow for the safe judgment that the defendant was deprived of a fair trial, requires the most thorough and careful deliberation. United States v. Nazzaro, supra: 304.

Moreover, it has been held that isolated incidents of a rash remark by the Court, which might be revealed in the record, that was far from being unprovoked, must in fairness to all parties be taken in context to see if prejudice to the defendant was the result, or was this

perhaps a tactic to goad the judge into error. United States v. Sclafani, 487 F.2d 245, 256 (2d Cir. 1973): United States v. McCarthy, 473 F.2d 300 (2d Cir. 1972).

In essence the question of whether the Court's conduct unduly influenced the jury's verdict requires both a quantitative and qualitative analysis. The test suggested by the case law poses two either-or questions: Would the weight of the record reveal an obvious tacit partnership between the Court and the government's attorney. United States v. Fernandez, 480 F.2d 726, 736-38 (2d Cir. 1973), or would the record reveal that the Court's intervention, even if extensive, in many instances, helped rather than harmed the defense before the jury, so as to negate the inference that intervention by the Court had created an impression that he favored the prosecution case. United States v. Pellegrino, 470 F.2d 1205, 1207-08, (2d Cir. 1972): and qualitatively, it asks would the character of the Court's intervention be of such nature that even a single remark might so prejudice the defense that the jury's verdict would be swayed in favor of the prosecution. United States v. Fernandez, supra: or would the evidence of guilt reflected in the record, particularly the evidence to be drawn from appellant's own testimony be so substantial that an improvident remark by the Court would not likely have an

effect upon the outcome. United States v. Pellegrino,
supra.

Applying the law to the facts of the instant case it is suggested that a cursory reading of the record puts to rest any notion that the Court's conduct of the trial could have possibly given the impression to any juror that there was a tacit partnership between Court and prosecutor.

If nothing else the Court's statement to the jury on the prosecutor's opening argument. (Tr. and Appellee's Appendix pp. 11-12), clearly apprised the jury as to the position he took with respect to the prosecution's case.

The badgering of prosecutor and witness alike, could not have failed to impress the jury that the Court was going to insure the fairness of the trial, and certainly belies the notion of any partnership or favorable treatment for the prosecution case. (Tr. and Appellee's Appendix pp. 13-15).

It is therefore a strained argument to suggest that the Court was endeavoring to assist the government's case.

Moreover, the assertion that the Court's comments as to the attorneys served to demean defense counsel in the eyes of the jury is totally without substance. The record clearly reflects that the prosecutor took the brunt of the

Court's caustic remarks. If anyone was put into the position of defending himself it was the prosecutor.

In contrast to the Court's reproachful attitude towards the prosecutor, the Court on two occasions actually commended counsel for Glen Snow in the presence of the jury. (Tr. and Appellant's Appendix pp. 32, 76-77). This certainly reflects that there is no intent on the Court's part to demean counsel before the jury.

The only serious remark in the entire record, made in the presence of the jury, which could possibly have had the effect of demeaning counsel for appellant Glen Snow, was the colloquy regarding Mr. Fisher's attempt to introduce prior inconsistent statements of the witness Votraw. (Tr. and Appendix pp. 210-211).

In context, however, as set forth under Item Heading A, supra, that remark was surely provoked. Mr. Fisher had requested the Court's assistance in how to properly impeach a witness with a prior inconsistent statement, and the Court endeavored in three separate attempts to instruct him in how it should be done. (Tr. and Appendix pp. 173-174).

Subsequently, although he was allowed to read into the record those matters which he felt to be inconsistent statements, he attempted to introduce the document and when the Court ruled it out, he continued to argue the point.

The Court even suggests to him again how he can put in the evidence, but he persists in arguing that he be allowed to do it his way, on the theory that the other way is too difficult. (Note here that the Court had earlier allowed Mr. Fisher a recess to review the very same document, which had been furnished prior to trial. (Tr. and Appendix pp. 171-172)).

The Court indicates to Mr. Fisher that it is not a discretionary matter but a rule of evidence which he could not overlook in view of the government's objection. Yet, Mr. Fisher continues to argue putting before the jury again and again that the statements are untrue.

The Court perhaps mindful of that ploy, suggesting to the jury that the Court is keeping from them a false statement made by the witness, which will keep them from knowing the truth, is prompted to remark:

"Proceed, Counselor. Don't go to law school here."

Which, incidentally Mr. Fisher reinforces by obviously baiting the Court to repeat it. (Tr. and Appendix pp. 210-211).

It is submitted that the remark was far from being unprovoked and in the context of the entire case had little, if any, effect upon the jury's verdict. United States v. Sclafani, supra; United States v. Pellegrino, supra.

Similarly, the Court's treatment of Mr. Hatch, counsel for appellant Samuel Snow, suggests no impropriety. He, too, reflected at least the inability to impeach a witness with a prior inconsistent statement. The Court, again comes to the assistance of the defense, and explains again how it should be done and again chastises the prosecutor in the process. (Tr. and Appendix pp. 195-196).

The only other matter involving Mr. Hatch, which occurred before the jury was his difficulty in making a proper objection, which is set forth under Item Heading A, supra. The Court can hardly be faulted for Mr. Hatch's frustration in not knowing the proper objection. Nor can the Court be faulted for the action he took in reprimanding Mr. Hatch for what the Court thought was a display of temper. The Court quite properly acted by excusing the jury and admonishing Mr. Hatch out of their presence.

Accordingly, it is submitted that the claim that Mr. Hatch was tyrannized by the Court has even less substance than Mr. Fisher's claim.

Additionally, the allegation of excessive participation in the questioning of the witnesses, as outlined by the appellee, under Item Heading B, supra, is patently frivolous. Less than forty questions out of 202 pages of testimony cannot be considered excessive.

There is nothing in this record to suggest the application of the cases cited by each appellant. Holmes v. United States, 271 F.2d 635 (4th Cir. 1959), did not reach the issue. United States v. Persico, 305 F.2d 534 (2d Cir. 1962), was a case involving repeated recriminations and displays of temper towards defense counsel, starting at the very outset of the trial during defense counsel's opening statement. That happened in the instant case, except that it happened to the prosecutor, and not without justification.

Moreover, there was no limit on defense counsel's cross-examination as in Persico, nor was there any comment made which would equal the degree of prejudice that attached to the comment in Persico, where the Court commented upon the fact that there was no defense.

The instant case is not like United States v. DeSisto, supra, where the judge extensively examined the witnesses taking charge of the questioning for the outset of their testimony. There is no example of that activity here.

Indeed on a quantitative test the court in DeSisto asked more than twice as many questions as the prosecutor, including 347 questions put to the defendant, whereas, here

the Court asked fewer than 40 questions, and only about a dozen questions asked of both appellants.

There was hardly any attempt, here, by the judge to elicit sympathy for the prosecutor, as in United States v. Guglielmini, 384 F. 2d 602 (2d Cir. 1967). If anything the Court's consistently caustic remarks, to the prosecutor, in the instant case could only disparage the prosecution. Note that the remark singled out in Guglielmini, was the court's remark to defense counsel in sustaining an objection to an argumentative question, he said, "Your time to sum up... will come later on." A similar remark was made in the instant case, in the same situation, "Please sum up later", however it was made to the prosecutor. (Tr. and Appendix p. 276).

Again, in Guglielmini, the court extensively interrogated the witnesses, noticeably the defendant, where few of the 170 or so pages of his testimony was free of some question by the court, whereas, here, in 117 pages of testimony involving both appellant's the Court asked but a dozen questions.

The more serious question, and its not clear that it is raised here on appeal, since neither appellant mentions it, is the effect that the Court's comments with respect to the credibility of the appellant Glen Snow, might have upon the jury.

With respect to this issue it should be noted that nothing in the record suggests that the Court in his questioning and comments during the prosecution's case has done anything to

create the impression that he favors the prosecution.

He asked no questions of the bank official and perhaps a half dozen questions of Agent Mangor and Votraw on direct obviously to clarify their testimony and often precipitated by defense objections, and he asked no questions of Agent Mangor on cross.

With respect to the cross-examination of Votraw the Court interrupted approximately a dozen times, when the witness could not be heard, to keep him from rambling, to clarify a gesture, and otherwise to clarify his testimony, in some instances the interruptions were favorable to the defense, as where the Court elicited from the witness that the testimony he was giving with respect to drug conversations he had with the appellants had nothing to do with the present charges. (Tr. and Appendix p.194).

Again the Court's inquiry into the fact that the witness was testifying under immunity and his further inquiry into when he was promised immunity and what had he told the government authorities prior to the grant of immunity, was arguably favorable to the defense, since it showed that he in fact had not told the truth previously, and that he was an interested party to the extent that he had been granted favorable treatment by the government.

The fact that he commented that Votraw's crime was a misdemeanor on Mr. Hatch's cross is of no moment since that was improper impeachment under Rule 609 of the Federal Rules of Evidence and was let in over the government's objection.

Accordingly, on the government's case there was no impropriety and the Court's questioning was no more than to clarify the testimony. United States v. Sclafani, 487 F. 2d 245, 256 (2d Cir. 1973). Moreover, some of the resulting testimony was helpful to the defense or at most neutral. United States v. Pellegrino, 470 F. 2d 1205 (2d Cir. 1972).

In the defense case the two questions the Court put to the appellant Samuel Snow are of no moment since they pertained to the earlier testimony of Glen Snow about an incident that occurred at a place and time where they both testified they were present. Those two questions out of some 32 pages of testimony can hardly be considered anything more than clarification of testimony and therefore neutral at best, since his answer were consistent with his defense.

On the direct testimony of Glen Snow, after some 23 pages of testimony, and after the time the appellant Glen Snow had committed himself to the defense that he was only just pretending to Agent Mangor that he was a drug dealer as a favor for Jules Votraw, the Court interrupted his testimony for the first time, beginning on p. 245 of the Transcript and Appendix.

He had testified that he did in fact see the alleged

source of the cocaine give a tinfoil packet to Votraw who opened it and tasted it, which was consistent with Votraw's testimony that there was a contact for cocaine present on that occasion and they had in fact acquired some. The Court's questioning therefore was nothing more than inquiry with respect to the earlier testimony to clarify the issues of fact.

However, when the Court inquired whether the witness knew what it was the witness responded he did not, although the thrust of his testimony was that it was Votraw and not he, who had acquired the cocaine. The fact that he claimed to be pretending to be a drug dealer, together with the fact that he claimed to be friends with everyone present belied the fact that he wouldn't have some idea as to what was in the packet, especially since he had reason to believe Votraw was dealing in drugs.

In any event his evasion of the question prompted the Court to remark

"Bubble gum?"

with respect to what did the witness think was in the packet.

Mr. Fisher either didn't hear the remark, in which case the jury might not have either, or else he was quick to capitalize on it by asking the Court to repeat it, which the Court did saying,

"I asked if he thought it was gum."

Thereafter the witness indicated that, indeed, he did think it was narcotics. (Tr. and Appendix pp. 246-247).

The Court did not ask another question until the completion of the direct, same ten pages of testimony thereafter, and those questions pertained to whether or not he even did tell Agent Mangor he would sell him the cocaine, which went to the function of clarifying the issue.

On the cross examination of Glen Snow, at a point where he was obviously, even in the record, stumbling to think of an answer, (Tr. and appendix pp. 256-257), the Court interrupted to ask how far he had gone in school, which is subject to the interpretation that the Court thought what he said was incredulous or that he might have been ignorant enough to go along with this pretense of being a drug dealer as a favor.

Later on in his testimony, where he is testifying that he is going along with this pretense to the point of asking Mangor for \$200 as a favor for Votraw, the Court interrupted and asked the witness if he had asked Votraw what the money was for, and the witness replied that he didn't. The Court then asked if he weren't curious as to why someone was giving him \$200, and thereafter the witness responded that the agent thought he would get the drugs for him. (Tr. and Appendix pp. 267).

The form of the question there might suggest disbelief, but since the witness had earlier testified that Mangor thought he was getting the cocaine for him, (Tr. and Appendix p. 266), the Court might simply have been confused and was simply trying to clarify that point. Since his answer to the Court's question was consistent with his earlier answer it is doubtful that any great harm occurred as a result of the form of the question.

The next two or three interruptions involve asking the witness to answer responsively and thereafter the Court inquires about the conversation on the trip to New York, which is simply clarifying that issue. (Tr. and Appendix pp. 279-280).

Later on in the testimony where the appellant is admitting that he did tell Mangor those things which Mangor testified he said, the Court interrupted, and subsequently asked,

"And you were just kidding, is that what you are telling us now?"

(Tr. and Appendix pp. 288-89).

This type of rhetorical question might give the impression that the Court disbelieves, but that is precisely what the appellant had said in earlier testimony, including his direct testimony, and his responses to the Court's questioning was consistent with that defense.

Still later on in the testimony the Court asked a similar question of the witness saying,

"You told us you were going along with this thing, pretending to be a supplier of narcotics?"

(Tr. and Appendix p. 297).

It is conceded that the remark concerning the "Bubble Gum" on the direct of Glen Snow, and the rhetorical questions as to his pretense of being a drug dealer could have given the jury the impression that the Court disbelieved his testimony.

Assuming that is so, however, the government contends that reversal of the conviction is not required. When the entire record is considered, including the cross-examination of Glen Snow, which is replete with reprimands to the prosecutor for being argumentative: it is clear that those isolated remarks by the Court occupy only brief moments in the entire proceeding.

They occurred after the prosecution's case-in-chief, and after the full story of the appellant's defense had been told to the jury. In view of the overwhelming proof in the prosecutions case, and the more than slightly tenuous nature of the defense, it is submitted that it is not likely that those remarks, so influenced the jury as

to alter its verdict. United States v. Pellegrino, 470 F. 2d 1205 (2d Cir. 1972).

Errors of the trial court which may be prejudicial in a close case, as being capable of affecting the result, can well be without any such rational basis in a strong case, and therefore not entitle the defendant to a reversal of his conviction. United States v. Porter, 441 F.2d 1204 (8th Cir. 1971); United States v. Dilts, 501 F.2d 531, (7th Cir. 1974).

CONCLUSION

Accordingly, it is respectfully submitted that the Judgment of Conviction as to both Glen Snow and Samuel Snow, appealed from, should be affirmed.

Respectfully submitted,

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BY:

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APPELLEE'S APPENDIX



APPEARANCES:

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* * * * *

(A jury of 13 was impanclled
including one alternate juror).

1 THE COURT: All right, proceed.

2 MR. O'SULLIVAN: Mr. Hatch, Mr.
3 Fisher, Members of the Jury: My name is Mr.
4 O'Sullivan and I am the attorney for the United
5 States who will be prosecuting this case. My
6 purpose in addressing you at this time is simply
7 to tell you what this trial is all about and what
8 the Government intends to prove through its evidence.

9 Now, nothing that I tell you or
10 the other lawyers tell you is evidence of any fact
11 in issue in the trial. The only evidence is the
12 testimony of the witnesses and any documentary and
13 physical evidence that is admitted into evidence by
14 the Court. All we lawyers get to do here is
15 introduce ourselves and tell you what we think our
16 evidence will show.

17 Now, this is a very relatively
18 simple conspiracy case. The Government, in order
19 to meet its burden of establishing the charge
20 against these two defendants, must show -- well,
21 first of all, let me tell you what the indictment
22 is all about.

23 The indictment alleges that the
24 defendant, Glen Snow and the defendant, Samuel
25 Snow, conspired together, which means that they

APPELLEE'S APPENDIX.

1 made an agreement with each other to distribute --
2 here in this case it means to sell one-half to one
3 ounce of cocaine, which is a controlled substance
4 under the Federal Law which makes it a Federal crime
5 to sell the cocaine, which means that if they had --

6 THE COURT: Mr. O'Sullivan, please
7 leave the law to me. Tell the jury what you expect
8 to prove.

9 MR. O'SULLIVAN: All right. The
10 indictment also alleges that in furtherance of the
11 object of this conspiracy to sell the cocaine, four
12 specific acts were taken to carry out the object of
13 the conspiracy.

14 Now, in order to meet its burden of
15 proof, the Government must show two things, two
16 essential elements. It must show that there is an
17 unlawful agreement between the defendant, Samuel
18 Snow --

19 THE COURT: Please leave that to the
20 Court. Don't let me have to tell you again, Mr.
21 O'Sullivan.

22 MR. O'SULLIVAN: Sorry, Your Honor.

23 THE COURT: Tell them what you
24 expect to prove, that is clear enough.

25 MR. O'SULLIVAN: All right. In

APPELLEE'S APPENDIX.

1 addition to this unlawful agreement, the Government
2 must prove that there was one act taken by one of
3 the defendants in furtherance of the object of that
4 conspiracy. You will hear testimony from the
5 Government witnesses that the defendant, Glen Snow,
6 met with a Federal undercover narcotics agent and
7 agreed to sell him one-half ounce or ounce of
8 cocaine. There will be further evidence from the
9 testimony of the Government witnesses that the
10 defendant, Samuel Snow, also met with the same
11 Federal undercover agent, and the testimony will
12 indicate that he had knowledge of the agreement
13 between Glen Snow and the Federal agent to purchase
14 this quantity of cocaine and that he was an active
15 participant in the conspiracy with Glen Snow to
16 acquire and sell this cocaine.

17 There will be further evidence that
18 in order to carry out the objectives of the con-
19 spiracy, a bank loan was necessary to provide
20 sufficient funds to purchase the cocaine. And
21 further testimony would show that this bank loan
22 had actually been taken out by the defendant, Glen
23 Snow.

24 In addition to that, there will be
25 testimony that the defendant, Glen Snow, sought

1 additional money from the Federal agent to acquire
2 this cocaine and that in fact he received money from
3 the Federal agent.

4 In addition to that, there will be
5 testimony to show that both defendants traveled
6 down to New York City to acquire this cocaine.
7 Additionally, there will be testimony to show --
8 well, those are the four. In addition to those
9 overt acts, the agreement of Glen. Snow to sell the
10 cocaine to the Federal agent and an agreement by
11 Samuel Snow to participate in that sale of cocaine
12 to the Federal agent would also be overt acts in
13 furtherance of conspiracy.

14 Now, I should point out that if the
15 Government meets its burden of showing the unlawful
16 agreement and one overt act in furtherance of that
17 agreement, that even though there was no actual
18 sale of the cocaine, that the Government would have
19 proved its case.

20 THE COURT: Mr. O'Sullivan, I don't
21 want to have to tell you again to leave the law to
22 the Court or I will declare a mistrial.

23 MR. O'SULLIVAN: I'm sorry.

24 THE COURT: I hesitate to interrupt
25 this way, ladies and gentlemen, but as I have told

1 you, I am the judge of the law. There is a good
2 reason for that. I am not an advocate here and I
3 will state the law down the middle as it is, and
4 neither side has any right to tell you what the law
5 is. That is the Court's function. That is the
6 first thing any young lawyer ought to learn out of
7 law school, but none of them up here seem to have
8 learned it.

9 MR. O'SULLIVAN: All right. The
10 testimony will show that there was an unlawful
11 agreement between both defendants to distribute the
12 cocaine, and that acts were taken to carry out that
13 agreement, one, to take out the bank loan; two, to
14 acquire additional money to acquire the cocaine;
15 three, to travel to New York City to acquire that
16 cocaine. Thank you.

17 THE COURT: Mr. Fisher?

18 MR. FISHER: The defendant, Glen
19 Snow, respectfully waives the opening.

20 MR. HATCH: Also us.

21 THE COURT: All right, proceed,
22 Mr. O'Sullivan.

23 MR. O'SULLIVAN: The Government
24 will call Special Agent Thomas Fitzpatrick.
25

THOMAS FITZPATRICK,

having been called as a witness in behalf of
the Government, was first duly sworn according
to law and testified as follows:

MR. FISHER: Your Honor, could we
ask if this witness testified before the Grand Jury,
and if so, could we have a copy of his testimony?

THE COURT: You can at the close of
his testimony unless the Government wishes to make
it available for you.

MR. O'SULLIVAN: This witness did
not testify before the Grand Jury.

THE COURT: All right. Let's worry
about those problems when we come to them, the
first question on cross-examination if you don't
get them out by pre-trial procedures, which nobody
seems to know up here either. Let's proceed.

DIRECT EXAMINATION

BY MR. O'SULLIVAN:

Q Agent Fitzpatrick, will you tell us by whom you are
employed?

A The Drug Enforcement Administration.

Q How long have you been so employed?

A Since July 1st, 1973.

Q Would you tell us what your job duties are?

APPELLEE'S APPENDIX.

For The Government - Fitzpatrick - Direct

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1 A I am a special agent in charge at Rouses Point,
2 New York District Office. I supervise narcotic
3 and numerous drug investigations within the Rouses
4 Point district.

5 THE COURT: Keep your voice up.

6 Q In April of 1975, were you involved in an investi-
7 gation of one Glen A. Snow and one Samuel Snow?

8 A That is correct, on April 4th, 1975.

9 Q Now, will you tell us how this investigation was
10 initiated?

11 A I received information from the confidential source
12 that Glen and Samuel Snow were dealing in ounce
13 quantities --

14 MR. FISHER: Objection as hearsay.

15 THE COURT: Sustained. Strike it
16 out, disregard it.

17 BY MR. O'SULLIVAN:

18 Q Will you tell us what activity you took then to
19 carry out this investigation?

20 MR. FISHER: I object to that, Your
21 Honor.

22 THE COURT: Sustained.

23 Q You testified that you conducted an investigation
24 of two defendants?

25 MR. FISHER: Same objection, Your

APPELLEE'S APPENDIX.

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1 Honor.

2 THE COURT: Sustained.

3 Q Well, tell us what you did then.

4 A All right. On April 4th, 1975, I instructed Special
5 Agent Benny Mangor --

6 MR. FISHER: I object to any
7 statement not in the presence of the defendant.

8 THE COURT: Sustained, it is hearsay.
9 A (Continuing) On April 4th, 1975, I, accompanied by
10 Special Agent Mangor, I met, or we met, with Jules --
11 that is Julian Votraw, at the State Police Barracks
12 in Westport, New York.

13 THE COURT: I'm sorry. I haven't
14 the slightest notion what is coming here and I want
15 to hear this before the jury does.

16 You may take a short recess.

17 (Jury leaves Courtroom).

18 THE COURT: All right, Mr. O'
19 Sullivan, let me hear this in camera without the
20 jury so that I will know what is coming and what
21 isn't, because, obviously, you don't.

22 MR. O'SULLIVAN: Well, he is on the
23 surveillance -- do you want me to tell you?

24 THE COURT: I want to know what his
25 testimony is going to be. I have no idea. So far,

1 everything you have asked has been improper and
2 inadmissible and incompetent. It would be reversed
3 on the appeal like that and it ought to be, so let's
4 get it straight.

5 MR. O'SULLIVAN: Well, as a pre-
6 liminary matter, I was going to show what informa-
7 tion led them to get the assistance of an informant
8 to introduce this undercover agent to the two
9 defendants.

10 THE COURT: Well, every bit of that
11 is incompetent, every single bit of it. Is that all
12 he is going to testify to?

13 MR. O'SULLIVAN: Well, he is under
14 the surveillance of that first meeting.

15 THE COURT: He can testify to what
16 he saw. He can testify to any introduction he made.
17 Tell me what he is going to say.

18 MR. O'SULLIVAN: Well, in the first
19 meeting, he was able to see the two defendants; he
20 is able to identify them.

21 THE COURT: You already went to the
22 meeting. He saw people, all right.

23 MR. O'SULLIVAN: And he also was
24 present when the defendant, Glen Snow meets the
25 undercover agent in the parking lot.

APPELLEE'S APPENDIX.

For The Government - Fitzpatrick - Direct

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1 THE COURT: Does he see the pass
2 of narcotics?

3 MR. O'SULLIVAN: The undercover
4 agent is wired and he is monitoring the conversation.

5 THE COURT: All right, but for
6 heaven's sake, watch what you are doing.

7 Let me hear his whole thing. We
8 will hear it without the jury. I have no confidence
9 that he isn't going to get into incompetent matters,
10 none at all.

11 MR. O'SULLIVAN: Tell us what you
12 did on April 4th, what you saw and what you heard
13 and what you did.

14 THE COURT: When? When you saw it,
15 who was present and what you did, what you heard?

16 THE WITNESS: Shall I return to our
17 meeting at the police barracks?

18 THE COURT: No, I don't care about
19 that. That is not competent evidence and you ought
20 to know it as a narcotics agent, somebody ought to
21 know it.

22 THE WITNESS: At about 9:20 p.m.,
23 I entered a restaurant --

24 THE COURT: 9:20 p.m. when and where?

25 THE WITNESS: April 4th, 1975 in

APPELLEE'S APPENDIX.

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1 Ausable Forks, New York where I observed a meeting
2 take place between Special Agent Mangor, Glen Snow
3 and Jules Votraw. At about 10 p.m. on the same
4 date and in the same location, Glen Snow left
5 Menconi's Restaurant, and shortly thereafter,
6 Samuel Snow arrived at the restaurant and sat down.

7 THE COURT: Where were you? Were
8 you in the restaurant?

9 THE WITNESS: Yes, sir.

10 THE COURT: At the bar?

11 THE WITNESS: At the bar.

12 THE COURT: You were watching
13 somebody sitting at tables or at the bar or what?

14 THE WITNESS: That is correct, sir.

15 THE COURT: All right.

16 THE WITNESS: I observed Samuel Snow
17 enter Menconi's Restaurant and sit down at the same
18 table where Special Agent Mangor and Jules Votraw
19 were sitting. At about -- please allow me to correct
20 myself at this point.

21 THE COURT: You can go ahead. There
22 is no jury here. I will have to sort out what is
23 competent and what isn't.

24 THE WITNESS: At 10 p.m., Glen Snow
25 left Menconi's and at about 10:30 --

1 THE COURT: You saw him leave?

2 THE WITNESS: Yes, sir. At 10:30
3 p.m. on the same date and in the same restaurant,
4 Samuel Snow arrived, came into the restaurant, sat
5 down at the table with Special Agent Mangor and
6 Jules Votraw. From where I was seated, I could
7 observe that a conversation was taking place. At
8 about 11 p.m. on the same date, Special Agent Mangor
9 and Jules Votraw left Menconi's. Several minutes
10 thereafter, I also left Menconi's and briefly met
11 with Special Agent Mangor and Jules Votraw in the
12 parking lot across from Menconi's Restaurant.

13 THE COURT: That is your testimony?

14 THE WITNESS: That is correct, sir.

15 MR. O'SULLIVAN: Then subsequent to
16 that time did you next see this same person you
17 observed meet the Federal agent in the restaurant?

18 THE WITNESS: The next observation
19 by me took place on April 9th, 1975 at the parking
20 lot of the Howard Johnson's Restaurant in Plattsburgh,
21 New York. I was parked back of the restaurant.
22 Special Agent Mangor was wearing a transmitter. I
23 was monitoring the transmissions when he met with
24 Glen Snow. If I might back up a moment, I observed
25 a red 1975 Pontiac enter the parking lot.

1 THE COURT: Let's back up some more.
2 Did you see somebody put a transmitter on Special
3 Agent whatever his name is?

4 THE WITNESS: Mangor, yes.

5 THE COURT: You saw that?

6 THE WITNESS: That is correct, sir,
7 I assisted.

8 THE COURT: All right. He has got
9 one on and you have got a listening device?

10 THE WITNESS: That's correct, sir.

11 THE COURT: All right.

12 THE WITNESS: I observed a car coming
13 in the Howard Johnson's parking lot which fit the
14 description of the car owned by Glen Snow.

15 THE COURT: How do you know that?

16 THE WITNESS: Because we observed
17 the car at Menconi's Restaurant.

18 THE COURT: You observed it?

19 THE WITNESS: I observed it.

20 THE COURT: Very well, you observed
21 it.

22 THE WITNESS: Yes, sir. The license
23 number is 850CUH, New York.

24 THE COURT: The same car you had
25 seen on an earlier occasion?

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1 THE WITNESS: That is correct.

2 THE COURT: Tell us just that and
3 not all these complications. It fit the description
4 of the car, the same car you saw before. Did Snow
5 get out of it?

6 THE WITNESS: Yes, sir. At that
7 time I was able to monitor the conversation between
8 Glen Snow and Special Agent Mangor. At this time
9 Glen Snow said that he acquired --

10 THE COURT: Had you ever heard Glen
11 Snow's voice before?

12 THE WITNESS: No, sir.

13 THE COURT: Go on, tell me, how do
14 you know it was Glen Snow?

15 MR. O'SULLIVAN: What was said in
16 the conversation?

17 THE COURT: How do you know it was
18 Glen Snow?

19 THE WITNESS: The transmissions
20 between Special Agent Mangor and Glen Snow.

21 THE COURT: You heard Special Agent
22 Mangor's voice before?

23 THE WITNESS: Yes, on numerous
24 occasions.

25 THE COURT: Do you know whether there

APPELLEE'S APPENDIX.

For The Government - Fitzpatrick - Direct

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1 were any other people in the room at the time with
2 Special Agent Mangor?

3 THE WITNESS: They were not meeting
4 in a room, sir, they were meeting in an automobile.

5 THE COURT: Could you see them?

6 THE WITNESS: No, I couldn't. I was
7 back of the restaurant so I would not be observed.

8 THE COURT: How do you know it was
9 Snow? It could have been Lloyd MacMahon. How do
10 you know?

11 THE WITNESS: As I recall, Special
12 Agent Mangor called Glen by name.

13 THE COURT: All right, tell us what
14 you heard.

15 THE WITNESS: All right. At this
16 time Glen Snow indicated that he needed \$200 advance
17 money.

18 THE COURT: Give us the conversation
19 not what was indicated. What was said by whom?
20 What did the agent say and what did this other man
21 say?

22 THE WITNESS: Glen Snow indicated
23 that he needed \$200. He said that Sam Snow --

24 THE COURT: That is where it started?
25 Take it from the beginning.

APPELLEE'S APPENDIX.

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1 THE WITNESS: I heard --

2 MR. O'SULLIVAN: All right, Your
3 Honor, we will dispense with this witness. We
4 will put the undercover agent on. He can testify
5 to what was said and what was done.

6 THE COURT: It is up to you.

7 All right, witness excused.

8 (Witness excused).

9 THE COURT: All right, let's recall
10 the jurors and see if we can start with some
11 competent evidence.

12 Do you know what this witness is
13 going to say, Mr. O'Sullivan? You have interviewed
14 him and prepared him to testify?

15 MR. O'SULLIVAN: I have interviewed
16 him.

17 THE COURT: Some of what he wants
18 to tell us is competent proof and a lot of it isn't,
19 and it is your job to sort it out.

20 MR. O'SULLIVAN: Well, would it be
21 all right after I put the undercover agent on to
22 recall Agent Fitzpatrick?

23 THE COURT: You better talk to him
24 first.

25 (Jury enters Courtroom).

Affidavit of Service

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County of Onondaga) ss.:
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Attorney(s) for **Appellee**

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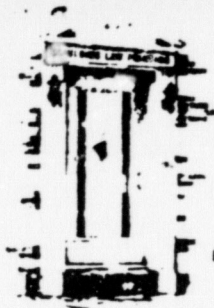
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Hon. A. Daniel Fusaro, Clerk
U. S. Court of Appeals, Second Circuit
Room 1702 U.S. Court House
Foley Square
New York, NY 10007

Re: U.S.A. v. Glen and Samuel J. Snow

~~Index No.~~ Docket No. 75-1420

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

~~xxxx~~ ~~xxxx~~

[10] Briefs

~~xxxx~~ ~~Original Record enclosed~~

~~xxxx~~ ~~Original Record to come~~

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Everett J. Rea

cc: James M. Sullivan, Jr., Esq.